Pacific & Oriental Insurance Co Bhd v Azhar bin Azizan (Mohd Ashraf Yusoff, as intervener)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24 NCVC-777–04 OF 2013
JOHN LOUIS O'HARA J
28 JANUARY 2014

Civil Procedure — Judgments and orders — Application to set aside — Jurisdiction of court to set aside order made in the same action

Civil Procedure — Judgments and orders — Application to set aside order given in the absence of one party — Whether O 35 r 1(2) of the Rules of Court 2012 only applies to writ actions

Civil Procedure — Parties — Intervener — Application to intervene — Establishing legal interest to intervene — Legal interest arising out of judgment in related suit — Whether application to intervene premature

Civil Procedure — Parties — Intervener — Application to intervene — When application can be made — Meaning of 'any stage of the proceedings' — Whether application must be made before judgment

Civil Procedure — Trial — Failure of one party to appear — Application to set aside judgment given in the absence of one party — Whether O 35 r 1(2) of the Rules of Court 2012 only applies to writ actions — Whether only a party to the action can apply to set aside

Insurance — Motor insurance — Policy of insurance — Road accident involving motorcar covered by policy — Third party risks — Claim under policy — Duty of disclosure — Policy obtained after death of motorcar owner — Insurer applied for declaration that insurance void and unenforceable — Whether insurer could avoid liability to third party for alleged accident — When must application to avoid liability be made — Road Transport Act 1987 s 96(3)

The plaintiff was an insurance company ('the insurer') and it had issued motorcar insurance policy to cover motorcar WFY 7550 for the period 28 February 2010 to 27 February 2011 in the name of one Sidek bin Deros,

deceased, ie the insured. On 23 May 2010, the intended intervenor, whilst riding his motorcycle, was involved in an accident with WFV 7550 and suffered injuries. The intended intervenor then filed a civil suit at the sessions court against Azhar bin Azizan (the driver) as the first defendant and Sidek bin Deros (the insured) as the second defendant. It was later found that the insured had died on 22 September 2004. The driver had purchased WFV 7550 from the insured but was having difficulty transferring WFV 7550 into his name. The driver had been renewing the policy with the insurer in respect of WFV 7550 in the insured's name. The insurer thus filed an originating summons (encl 3) seeking a declaration that the policy of insurance was void and unenforceable. An order in terms of encl 3 was granted on 14 May 2013 ('the order'). The intended intervenor then filed the present application pursuant to O 15 r 6 of the Rules of Court 2012 ('the ROC') seeking to intervene and set aside the order. The intended intervenor also relied on O 35 r 1(2) claiming that the order was a default judgment. The intended intervenor contended his legal interests were derived from s 96(1) of the Road Transport 1987 (the Act) and that his legal interest would therefore only be assertable if he was made a party to the insurer's application in encl 3.

Held, dismissing the application to intervene with no order as to costs:

(1) In view of the decisions in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 and in *Puncak Permata Sdn Bhd (under creditor's voluntary liquidation) v Tham Weng Hong & Anor* [2011] 5 MLJ 78 , the case of *Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27 is no longer good law. The dicta in the case of *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 has now to be read and applied in consonance with the decision of the *Staghorn* case by which is meant that the flexible approach in *Pegang Mining* has been tightened up and the meaning of an application to intervene at 'any stage of the proceedings' has to mean any stage before judgment (see para 16).

(2) Order 35 r 1(2) applies to a trial of an action and not to originating summons proceedings which is governed by O 28. An entity which was not a party to the action could not apply to set aside the order pursuant to O 35 r 1(2) so because the entity had a specific remedy provided by s 96(1) of the Act to file for recovery against the insurer (see paras 18–19).

(3) The court has no power to set aside an order made in the same action where the judgment has been regularly obtained and after it had been entered and drawn up (see para 23).

(4) Section 96(1) of the Act has to be read with s 96(3) of the Act and the proviso thereto. Section 96(3) spells out that the insurers need to obtain a declaration from a court that the insurance was void or unenforceable. The words 'before the date the liability was incurred' in s 96(3) mean

liability incurred as a result of a judgment handed down by a court of competent jurisdiction and not liability incurred as a result of the accident in question (see para 27).

(5) The intended intervener's legal interest to intervene only came into existence if and when he had obtained judgment against the insured. Once the intended intervenor had obtained judgment against the insured, he therefore would then have a legal right to intervene as he could then claim a legal interest in the insurers application for a declaration (see para 28).

(6) The order was obtained before the conclusion of the sessions court action and therefore there was no obligation on the part of the insurer to serve the cause papers relating to encl 3 upon the intended intervenor. The intended intervenor had not yet derived a legal interest that would entitle him to intervene as the matter was purely between the insurer and the insured (see para 29).

(7) The date the liability was incurred was the date of the judgment in the sessions court and not the accident. As such it is not only premature for the intended intervenor to claim that he had a legal interest, but the intended intervener's remedy would be through a recovery action once he obtained judgment in the sessions court (see para 31).

[Bahasa Malaysia summary

Plaintif adalah syarikat insurans ('insurer') dan ia telah mengeluarkan polisi insurans motokar untuk melindungi motokar WFY 7750 untuk tempoh 28 Februari 2010 hingga 27 Februari 2011 atas nama Sidek bin Deros, si mati, iaitu pengambil insurans. Pada 23 Mei 2010, pencelah dimaksudkan, sewaktu menunggang motorsikalnya, terlibat dalam satu kemalangan dengan WFV 7550 dan mengalami kecederaan. Pencelah dimaksudkan kemudiannya memfailkan guaman sivil di mahkamah sesyen terhadap Azhar bin Azizan (pemandu) sebagai defendan pertama dan Sidek bin Deros (pengambil insurans) sebagai defendan kedua. Ia kemudiannya didapati bahawa pengambil insurans telah meninggal dunia pada 22 September 2004. Pemandu telah membeli WFV 7550 daripada yang diinsuranskan tetapi mengalami kesukaran untuk menukar WFV 7550 kepada namanya. Pemandu telah memperbaharui polisi dengan insurer berkaitan dengan WFV 7550 atas nama pengambil insurans. Insurer oleh itu memfailkan saman pemula (lampiran 3) memohon deklarasi bahawa polisi insurans adalah tidak sah dan tidak boleh dilaksanakan. Satu perintah kepada terma lampiran 3 telah diberikan pada 14 Mei 2013 ('perintah'). Pencelah dimaksudkan kemudian memfailkan permohonan ini menurut A 15 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM') memohon untuk mencelah dan mengetepikan perintah. Pencelah dimaksudkan juga bergantung kepada A 35 k 1(2) mendakwa bahawa perintah adalah penghakiman ingkar. Pencelah dimaksudkan menghujahkan bahawa

kepentingan undang-undangnya adalah berdasarkan s 96(1) Akta Pengangkutan Jalan 1987 ('Akta itu') dan bahawa kepentingan undang-undangnya oleh itu akan hanya boleh dituntut jika dia dijadikan satu pihak kepada permohonan insurer dalam lampiran 3.

Diputuskan, menolak pemohonan untuk mencelah tanpa perintah terhadap kos:

(1) Berdasarkan keputusan di *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 dan di *Puncak Permata Sdn Bhd (under creditor's voluntary liquidation) v Tham Weng Hong & Anor* [2011] 5 MLJ 78 , kes *Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27 bukan lagi undang-undang yang baik. Dicta dalam kes *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 kini hendaklah dibaca dan digunakan selaras dengan keputusan kes *Staghorn* yang mana bererti bahawa pendekatan yang fleksibel dalam *Pegang Mining* telah mengetatkan dan makna sesuatu permohonan untuk campur tangan di 'any stage of the proceedings' mempunyai bermaksud mana-mana peringkat sebelum penghakiman (lihat perenggan 16).

(2) Aturan 35 k 1(2) diguna pakai kepada perbicaraan kepada satu tindakan dan bukan prosiding saman pemula yang mana tertakluk oleh A 28. Sebuah entiti yang bukan pihak dalam tindakan itu tidak boleh memohon untuk mengetepikan perintah menurut A 35 k 1(2) kerana entiti mempunyai remedi yang khusus yang disediakan oleh s 96(1) Akta untuk memfailkan untuk mendapatkan pemulihan terhadap insurer (lihat perenggan 18–19).

(3) Mahkamah tidak mempunyai kuasa untuk mengetepikan perintah yang dibuat di dalam tindakan yang sama di mana penghakiman itu telah diperoleh secara teratur dan selepas ia telah dimasukkan dan diputuskan (lihat perenggan 23).

(4) Seksyen 96(1) Akta hendaklah dibaca bersama dengan s 96(3) Akta dan proviso kepadanya. Seksyen 96 (3) menjelaskan bahawa insurer perlu untuk mendapatkan pengisytiharan daripada mahkamah bahawa insurans itu tidak sah atau tidak boleh dikuat kuasakan. Perkataan 'before the date the liability was incurred' dalam s 96(3) bermakna liabiliti yang ditanggung akibat daripada suatu penghakiman yang diputuskan oleh mahkamah yang mempunyai bidang kuasa kompeten dan bukanlah liabiliti yang ditanggung akibat kemalangan yang berkenaan (lihat perenggan 27).

(5) Kepentingan undang-undang pencelah dimaksudkan untuk campur tangan hanya wujud jika dan apabila dia telah mendapat penghakiman terhadap pengambil insurans. Apabila pencelah dimaksudkan telah

mendapat penghakiman terhadap pengambil insurans, maka dengan itu dia akan mempunyai hak undang-undang untuk campur tangan kerana dia kemudian boleh menuntut kepentingan undang-undang dalam permohonan insurer untuk perisytiharan (lihat perenggan 28).

(6) Perintah telah diperolehi sebelum penutup sesi tindakan mahkamah dan oleh itu tidak ada kewajipan di pihak insurer untuk memyerahkan kertas kausa yang berkaitan dengan lampiran 3 atas pencelah yang dicadangkan. Pencelah dimaksudkan belum memperolehi kepentingan undang-undang yang akan memberi hak kepadanya untuk campur tangan kerana perkara itu adalah semata-mata di antara insurer dan pengambil insurans (lihat perenggan 29).

(7) Tarikh liabiliti yang dikenakan adalah tarikh penghakiman di mahkamah sesyen dan bukan tarikh kemalangan. Oleh itu ia bukan sahaja pramatang bagi pencelah dimaksudkan untuk mendakwa bahawa dia mempunyai kepentingan undang-undang, tetapi remedi pencelah dimaksudkan itu akan melalui tindakan pemulihan sebaik sahaja dia mendapat penghakiman di mahkamah sesyen (lihat perenggan 31).]

Notes

For cases on judgments and orders in general, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5144–5146.

For a case on intervener, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 6517.

For cases on trial in general, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 10333–10458.

For a case on policy insurance in general, see 8(1) *Mallal's Digest* (5th Ed, 2015) para 466.

Cases referred to

Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2011] 5 MLJ 512; [2011] 7 CLJ 121, FC (refd)

Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis [1991] 2 MLJ 27, SC (not folld)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (not folld)

Kumarasamy Pillai Govindaraju @ K Govindaraju a/l Kumarasamy Pillai & Ors v Vijayasundaram a/l Sambantham Mudaliar & Anor (Vegadachalam a/l Palaniappen, intervener) [2010] 4 MLJ 567, HC (refd)

Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor [2013] 9 MLJ 675; [2013] 1 LNS 40, HC (refd)

Lea Wah Enterprise Sdn Bhd v Tai Sing Chu [2012] 10 MLJ 51; [2013] 5 CLJ 537, HC (distd)

Pacific & Orient Insurance Co Bhd v Goh Cheng Loong and Another, Adib Shah bin A Rahman (proposed intervenor) Originating Summons No 24 NCVC-278–02 of 2012 (unreported) (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (not folld)
Puncak Permata Sdn Bhd (under creditor's voluntary liquidation) v Tham Weng Hong & Anor [2011] 5 MLJ 78, CA (refd)
Yogananthy a/p AS Thambaiya v Idris bin Osman [2010] 5 MLJ 676; [2010] 5 CLJ 654, CA (distd)

Legislation referred to

Road Transport Act 1987 ss 96(1), 96(3)
Rules of the High Court 1980 O 15 r 6, O 35 r 1(2), r 2(1)
Rules of Court 2012 O 15 r 6

R K Nathan (Vinod Kamalanathan & Assoc) for the plaintiff.
V K Dasarathraj (Kuldeep singh with him) (Kuldeep Singh Gill, J Jena & Co) for the proposed intervener

John Louis O'Hara J:

INTRODUCTION

[1] This matter came before this court as the hearing of the intended intervenor's application encl 7 for, inter alia, the following orders:

> 2. Bahawa Pemohon diberi kebenaran untuk mencelah di dalam presiding ini dan dinamakan sebagai Defendan Kedua;
>
> 3. Perintah Deklarasi yang diberikan oleh Mahkamah Yang Mulia ini pada 14hb. Mei 2013 diketepikan;
>
> 4. Susulan daripada Perintah dua (2) dan tiga (3) di atas:
>
> (a) Plaintif Pacific Orient Insurance Co Bhd (No Syarikat 12557-W) diberi kebenaran untuk meminda tajuk di dalam Saman Pemula dan menyerahkan Saman Pemula terpinda kepada Peguamcara Pemohon sebagai Peguamcara Defendan Kedua;
>
> (b) Pemohon diberi kebenaran untuk memfailkan. Afadavit Jawapan/Bantahan dalam tnasa 14 hari dari tarikh Saman Pemula Terpinda bermeterai diserahkan kepada Peguamcara pemohon.

[2] The court dismissed encl 7 and the intended intervenor now appeals against the court's decision.

[3] In handing down its decision on 22 November 2013 the court did state

that proper grounds would follow if required. These then are the court's proper grounds.

THE FACTUAL MATRIX

[4] The relevant facts are indisputable and are well set out by the parties in their respective written submissions.

[5] For ease of reference, the plaintiff is an insurance company ('the insurer') and it had issued motorcar insurance policy No 02–01–10-MFY-001229 to cover motorcar WFY 7550 for the period 28 February 2010 to 27 February 2011 in the name of one Sidek bin Deros, deceased, ie the insured.

[6] On 23 May 2010 intended intervenor, whilst riding on motorcycle bearing registration No KAV 7847, was involved in an accident with WFV 7550 at Jalan Selekoh Batu 7, Simpang Empat, Sedaka.

[7] As a result of the accident, the intended intervenor suffered injuries. Upon serving the requisite statutory notice on the Insured, the intended intervenor proceeded to file a civil suit in the Sungai Petani Sessions Court Civil Action No 53-954-08 of 2011. In this civil action Azhar bin Azizan ('the driver') was named as the first defendant and Sidek bin Deros ('the insured') was named as the second defendant.

[8] The driver ie the first defendant in the sessions court at Sungai Petani then lodged a police report No K000920/2010 in which he admitted that he was the driver of WFV 7750 at the material time.

[9] As the insured did not attend at their solicitors for a briefing, the plaintiff retained the services of Progressive Adjustment Sdn Bhd ('the adjusters') to investigate this matter. The adjuster's report shows clearly that the insured (second defendant in the civil action at the Sungai Petani Session Court) had died on 22 September 2004 at 4.30pm whereas the accident had occurred on 23 May 2010.

[10] The adjuster's report also indicates that the driver Azhar bin Azizan had purchased WFV 7550 from the insured but had not changed the ownership to his name and because the insured had already passed on, the driver was having difficulty transferring WFV 7550 into his name. The driver Azhar bin Azizan had been renewing the policy with the insurer in respect of WFV 7550 in the insured's name for the period 28 February 2010 to 27 February 2011.

[11] The insurer then filed encl 3 (supported by affidavit encl 2) seeking the

following relief:

> (a) Untuk satu deklarasi bahawa polisi insuran No. 02–01–10-MFY-001229 dan sijil insuran No. 020110MFY001229 dari tempoh 28.2.2010 hingga 27.2.2011 tengah rnalam yang dikeluarkan kepada 'insured' SIDEK BIN DEROS (simati) berkenaan . motokar No. WFV 7550 diistiharkan batal dan tidak berkuatkuasa;
>
> (b) kos tindakan ini;
>
> (c) Sebarang relif lanjutan atau lainan yang dianggap wajar oleh Mahkamah yang Mulia ini;

and an order in terms of encl 3 was granted on 14 May 2013.

[12] The intended intervenor then filed encl 7 above.

CONSIDERATION AND DECISION

[13] The intended intervenor seeks to intervene and set aside the above order of court dated 14 May 2013. He relies upon O 15 r 6 of the Rules of Court 2012. Order 15 r 6 reads as follows:

> (2) subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as its thinks just and either of its own motion or on Application.
>
> (b) Order any of the following persons to be added as a party, namely:
>
> (i) Any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all maters in dispute in the cause or matter may be effectually and completely determined and . adjudicated upon; or
>
> (ii) Any person between whom and any party to the cause or matter there may exist a question is issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between the parties to the cause or matters.

[14] In *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622(FC) ('the Staghorn case') the Federal Court held that an application to intervene must be made before judgment, notwithstanding the fact that O 15 r 6 of the then RHC 1980 states that the said application may be made 'at any stage of the proceedings'. The Federal Court went on to hold that the application must be made before judgment, otherwise the proceedings have already been concluded and that there is no longer a proceeding in existence for the party to intervene in, and the judge had also become functus officio. See also *Puncak Permata Sdn Bhd (under*

creditor's voluntary liquidation) v Tham Weng Hong & Anor [2011] 5 MLJ 78(CA) where the Court of Appeal in following the decision in the *Staghorn* case held, that where the proceedings had clearly concluded, it is therefore too late to intervene and the court held that the High Court was wrong in allowing the application to intervene. This court is bound by the decision in the *Staghorn* case and *Puncak Permata*. Therefore it is also the decision of this court that in view of the *Staghorn* case and *Puncak Permata* the case of *Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27 relied upon by the intended intervenor is no longer good law.

[15] This brings up the case of *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 relied upon by the intended intervenor, where the Privy Council in the judgment of Lord Diplock pronounced as follows at p 55:

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.

[16] It is the decision of this court that the above dicta has now to be read and applied in consonance with the decision of the *Staghorn* case by which is meant that the flexible approach in *Pegang Mining* has been tightened up and the meaning of an application to intervene at 'any stage of the proceedings' has to mean any stage before judgment.

[17] The intended intervenor also places reliance on O 35 r 1(2) and argues that the order that the insurer had obtained against the defendant (driver and owner) was a default judgment.

[18] This rule applies to a trial of an action and not to originating summons proceedings which is governed by O 28. Furthermore O 35 r 2(1) clearly states that the person applying to set aside must be the party who did not attend ie in this case, the defendant and not the intended intervener as in this case, because in this case no third party proceedings had been commenced against the intended intervenor.

[19] So in this case we have an entity which is not a party to the action applying to set aside the order and the court is of the view that he cannot do pursuant to O 35 r 1(2) of the ROC 2012 so because the entity who is not a party to the action has a specific remedy provided by s 96(1) of the Road Transport Act 1987 to file for recovery against the insurer.

[20] The cases relied upon by the intended intervenor ie *Yogananthy a/p AS Thambaiya v Idris bin Osman* [2010] 5 MLJ 676; [2010] 5 CLJ 654 and *Lea Wah Enterprise Sdn Bhd v Tai Sing Chu* [2012] 10 MLJ 51; [2013] 5 CLJ 537 are easily distinguishable. In *Yyogananthy* the entity applying to set aside the judgment was the defendant and not the intended intervenor. Similarly the issue in contention in *Lee Wah* was between the plaintiff and the defendant and not the intended intervenor.

[21] The order obtained by the insurer in this case was regularly obtained notwithstanding that the driver who was named as defendant did not attend although duly served. The court had considered the affidavit evidence of the insurer and its submissions before it arrived at a considered and reasoned decision to allow encl 3.

[22] It is also the court's finding that the case of *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2011] 5 MLJ 512; [2011] 7 CLJ 121 relied upon by the intended intervenor can be distinguished because the declaratory order was made by the court on 14 May 2013 in exercise of its discretion after considering the supporting evidence in the insurer's affidavit encl 2, and arguments advanced in support thereof by counsel for the insurer.

[23] It is the further decision of this court that encl 7 must be dismissed *in lemine* because a court has no power to set aside an order made in the same action where the judgment has been regularly obtained and after it had been entered and drawn up. See *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where Chang Ming Tat FJ stated at p 144 as follows:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: Re St Nazaire Co, *Kelsey v Doune*, *Hession v Jones*, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co and Jonesco v Beard*. The hearing of the action will in a proper case be expedite: *Smith v Peizer*.

[24] In the subsequent case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, Mohd Azmi FCJ at p 409 stated as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another

High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court ... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader leader J (as he then was) in *Eu Finance Bhd v Kim Yoke Foo* [1982] 2 MLJ 37at p 39 provides the correct guideline on the subject:

[25] There is no evidence before this court to prove that the order made by this court on 14 May 2013 is null and void on the ground of illegality or lack of jurisdiction.

[26] Be that as it may, after leaving aside the procedural obstacles that the intended intervenor faces in regard to encl 7, which procedural obstacles this court rules the intended intervenor has not overcome, this court now goes on to consider the intended intervenor's legal interest if any, in this matter. The intended intervenor contends his legal interests are derived from s 96(1) of the Road Transport Act 1987 ('the Act'). The intended intervenor goes on to contend that his legal interest would therefore only be assertable if he is made a party to the insurer's application in encl 3 and for that reason he seeks that the order made by the court on 14 May 2013 be set aside.

[27] Now s 96(1) has to be read with s 96(3) and the proviso thereto. Section 96(3) specifically provides the procedure for the insurers to move the court against its insured to obtain the applied for declaration. This court reads s 96(3) as specifically spelling out that the insurers need to obtain a declaration from a court that the insurance was void or unenforceable. In considering s 96(3) this court construes the words 'before the date the liability was incurred' in s 96(3) to means liability incurred as a result of a judgment handed down by a court of competent jurisdiction and not liability incurred as a result of the accident in question because the latter is vague and uncertain especially in regards to contribution (if any) and quantum. Moreover it would be an intolerable

burden to place upon the insurer (and other insurers) to obtain the declaration before the accident occurred it the court were to accept the intended intervener's construction that liability is incurred at the time of the accident. As such this court find that it is constrained to differ from the interpretation of the learned judge in *Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor* [2013] 9 MLJ 675; [2013] 1 LNS 40, in regard to the phrase 'before the date the liability was incurred'.

[28] Therefore this court's interpretation is that the intended intervener's legal interest to intervene only comes into existence if and when he has obtained judgment against the insured after which date if the insurer intends to apply to declare the policy void and unenforceable against the insured, the insurer would also have to serve all the cause papers on the intended intervenor. Once the intended intervenor had obtained judgment against the insured, he therefore would then have a legal right to intervene as he could then claim a legal interest in the insurers application for a declaration (as regards legal interest see *Kumarasamy Pillai Govindaraju @ K Govindaraju a/l Kumarasamy Pillai & Ors v Vijayasundaram a/l Sambantham Mudaliar & Anor (Vegadachalam a/l Palaniappen, intervener)* [2010] 4 MLJ 567 and *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52).

[29] In this instant case the declaratory order dated 14 May 2013 was obtained before the conclusion of the civil suit in Sungai Petani Sessions Court Civil Action No 53–954–08 of 2011 and therefore there was no obligation on the part of the insurer to serve the cause papers relating to a matter between the insured and the insurer upon the intended intervenor. Furthermore it's the court's decision that the intended intervenor had not yet derived a legal interest that would entitle him to intervene as the matter is purely between the insurer and the insured.

[30] As the declaratory order of 14 May 2013 merely declares the insurer's rights and cannot be used to enforce its right, it was therefore necessary for the insurer to obtain the order so as to declare its rights against the insured. This reinforces the courts view that encl 3 is purely a matter between the insurer and the insured and therefore this court ought not to entertain the intended intervener's application in encl 7. Therefore it is the court's finding that if and when the intended intervenor did obtain judgment against the insured it could then proceed to recover the judgment it had obtain by the recovery action against the insurer by virtue of s 96(1). With the declaratory order, the insurer could seek reimbursement from the insured of the judgment sum as and when it is paid to the intended intervenor.

[31] This court was referred to the judgment in *Pacific & Orient Insurance Co Bhd v Goh Cheng Loong and Another, Adib Shah bin A Rahman (Proposed*

Intervenor) High Court Malaysia, Kuala Lumpur Originating Summons No 24 NCVC-278–02 of 2012. With humility and due respect to the learned judge in that case, this court begs to differ from his pronouncement in his judgment wherein he states that 'he finds no merit in the argument that the intervenor could advance his case at the recovery stage'. In the judgment there has been no reference to s 96(1), by which section the intended intervenor has a right to proceed to file recovery proceedings notwithstanding the declaratory order obtained by the insurer against the insured. To reiterate, the finding of this court is that the date the liability was incurred would be the date of the judgment in the Sungai Petani Sessions Court Civil Action 53-954–08 of 2011 and not the accident. As such it is not only premature for the intended intervenor to claim that he has a legal interest, but the intended intervener's remedy would be through a recovery action once he obtains judgment in the Sungai Petani Sessions Court Civil Action.

CONCLUSION

[32] Based upon the above reasoning it is the conclusion of this court to disallow the intended intervenor's application to intervene and claim the relief prayed for. This court rules in favour of the insurer and dismisses the intended intervenor's encl 7 with each party to bear its own costs.

ORDER

[33] So ordered accordingly.

Application to intervene dismissed with no order as to costs

Reported by Kanesh Sundrum